Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

WILLIAM METT and MARVIN WISEMAN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a federal criminal statute punishes a pension fund administrator's "willful" conversion of funds subject to ERISA, does this Court's opinion in *Bryan v. United States*, 524 U.S. 184 (1998), as well as related precedent, require the government to prove that the defendant knew his conduct was unlawful?

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OPINIONS BELOW

The published opinion of the Ninth Circuit Court of Appeals (App. 1-16, *infra*) is reported at *United States v. Wiseman*, 274 F.3d 1235 (9th Cir. 2001). The Ninth Circuit's previous published opinion in the case is reported at *United States v. Mett*, 178 F.3d 1058 (9th Cir. 1999).

The district court issued an oral opinion (App. 17-27, *infra*) finding defendants guilty of the federal criminal offenses described below. That opinion is unreported.

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeal entered its judgment on December 19, 2001. Petitioners thereafter requested and obtained an extension of time to file a petition for rehearing and/or petition for hearing en banc. The Ninth Circuit denied petitions for panel rehearing and for rehearing en banc in an order dated February 28, 2002 (App. 28, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. section 664 provides:

§ 664. Theft or embezzlement from employee benefit plan

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or

> other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined under this title, or imprisoned not more than five years, or both.
>
> As used in this section, the term "any employee welfare benefit plan or employee pension benefit plan" means any employee benefit plan subject to any provision of title I of the Employee Retirement Income Security Act of 1974 [29 U.S.C.A § 1001 et seq.].

* * *

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

In 1997, defendants Mett and Marvin Wiseman were each convicted of the following offenses: one count of conspiracy (18 U.S.C. § 371) to misappropriate the assets of two employee benefit plans subject to the Employee

Retirement Income Security Act of 1974 ("ERISA"), as prohibited by 18 U.S.C. § 664; eleven substantive counts of misappropriation of assets from these employee benefit plans (18 U.S.C. § 664); and one count of unlawfully serving as trustees of the plans after a prior conviction of a felony (29 U.S.C. § 1111). Defendant Mett was also convicted of one count of filing a false annual report relating to one of the plans (18 U.S.C. § 1027).

On defendants' initial appeal, the Ninth Circuit held that key evidence introduced at the trial had been obtained in violation of the attorney-client privilege. The Court therefore reversed the convictions on all counts and remanded the case for a new trial. *United States v. Mett*, 178 F.3d 1058 (9th Cir. 1999).

At the retrial, the district court rejected two proposed instructions which defendants had submitted in connection with the alleged § 664 violations. With the understanding that these rulings would be preserved for purposes of appeal, defendants waived a trial by jury and agreed to a bench trial on the transcripts and exhibits of the initial trial. Defendants were again convicted on all counts, and again appealed the result to the Ninth Circuit.

In an opinion issued on December 19, 2001, a Ninth Circuit panel 1) reversed defendants' convictions for unlawful service as trustees of the benefit plans, but 2) affirmed the conspiracy and substantive convictions under 18 U.S.C. § 664 relating to pension plan embezzlement, as well as the counts alleging defendant Mett's filing of a false annual report. *See United States v. Wiseman*, 274 F.3d 1235 (9th Cir. 2001) (hereafter "*Wiseman*").

Defendants subsequently sought and received a thirty day extension of time, to and including February 1, 2002,

to request panel rehearing and/or rehearing en banc. Timely petitions requesting panel rehearing and rehearing en banc were denied in a Ninth Circuit order issued on February 28, 2002. With its submission ninety days from the date of that order, the instant petition is timely before this Court.

STATEMENT OF FACTS

A. Underlying Facts

The following is a summary of the essential facts underlying defendants' § 664 convictions, as set forth by the Ninth Circuit in its initial decision (*United States v. Mett*, 178 F.3d at 1060-61; *see also Wiseman*, 274 F.3d at 1238-39), and as augmented with other facts adduced at defendants' initial trial:

Mr. Mett founded Center Art Galleries ("CAG"), a retail art gallery, in 1973 and served as its president and sole shareholder. Mr. Wiseman served as a vice-president, responsible for staff training and art acquisition. Both defendants also served on the CAG board of directors. In 1977, CAG established two pension benefit plans for its employees. Both plans were funded solely by CAG contributions, and both were covered by ERISA. At all relevant times, Mett and Wiseman served as trustees for both plans, while CAG served as the plan administrator.

CAG fell on hard times in the early 1990s. Between March 1990 and November 1991, in order to meet CAG's financial obligations, Mett and Wiseman withdrew approximately $1.6 million from the pension plans and deposited the funds into CAG's general operating

accounts. At no time during 1990 and 1991 did the defendants inform their employees of these transactions.

At the initial trial, the court prohibited defendants from introducing evidence showing that CAG employees would have authorized the transfers in order to ensure the payment of salaries and other benefits. (6-6-97 RT 11, 38-39; JER 183-190; *see also* Dkt. No. 90, JER 191-264 [declarations from 33 employees to effect that they would have authorized the disputed transfers])[1]

Defendants also presented evidence that earlier transfers from the plans into the operating account had been repaid (6-18-97 RT 207-217, Def. Exh. 36-39), and that accounting personnel had routinely been directed to treat all such transfers as advances or loans. (6-19-97 RT 7-19, 40, 123-4) Other defense evidence indicated that a substantial portion of the disputed transfers had, in fact, represented excess contributions under the relevant plan documents (6-19-97 RT 70-75); that the company had assets which were more than sufficient to secure repayment at the time the transfers occurred (6-19-97 RT 76-85); and that a significant portion of the transfers were later repaid in accordance with subsequently executed promissory notes. (6-19-97 RT 76-79) The defense also established that roughly a third of the funds transferred into the general account represented defendants' *own* accrued benefits in the pension plans. (6-23-97 RT at 25, 31-38, Def. Exh. 82, 83)

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[1] "RT" refers to the Reporter's Transcript relating to defendants' initial trial, while "JER" refers to the Joint Excerpts of Record submitted in support of defendants' initial appeal.

B. The Rejected Instruction

At defendants' initial trial, the district court instructed the jury concerning § 664's elements as follows:

> Counts 2 through 12 of the indictment charge the defendants with embezzling or stealing or unlawfully converting the assets of an employee benefit plan to their use or the use of another.
>
> In order to prove a defendant guilty of such a charge, the government must prove each of the following elements beyond a reasonable doubt.
>
> First, that a defendant took or diverted for his own use or the use of another assets belonging to an employee benefit plan in a manner *which he knew was inconsistent with his fiduciary duties to the employee benefit plan.*
>
> Second, the assets taken or diverted were under the control of the defendant by virtue of his position as trustee of the plan.
>
> And third, in taking or diverting the assets, the defendant acted with *a fraudulent intent to knowingly and wrongfully* deprive the pension plan of its assets.

(RT of 6-23-97, 202-3) (Emphasis added)

Despite these apparent requirements as to knowledge and intent, the court also instructed the jury that:

> Now, an act is done knowingly if it is done – if the defendant is aware of the act and does not act or fail to act through ignorance, mistake, or accident. *The government is not required to prove*

> *that a defendant knew that his acts were unlawful.*

(6-23-97 RT at 203) (Emphasis added)

Before the retrial, defendants requested an instruction aimed at resolving the perceived inconsistencies between the foregoing instructions by unequivocally requiring the government to prove that the defendants *knew* that the transfers were unlawful. The proposed instruction stated:

> In Counts One to Twelve, the defendants in this case are charged with conspiring to steal, and with stealing, money from two benefit plans established for Center Art Gallery employees. In order to commit these charged crimes, the defendants must have willfully taken or appropriated funds from the plan in a manner that was unauthorized by law while acting with specific criminal intent. *The government thus must prove beyond a reasonable doubt that the defendants took money from the funds knowing that it was illegal to do so.*

(Appellants' Joint Excerpts of Record filed November 20, 2000, at 45) (Emphasis added) The district court, however, rejected the proposed instruction, thereby generating one of the stipulated bases for defendants' future appeal. *Wiseman*, 274 F.3d at 1239-40.

REASONS FOR GRANTING THE PETITION

Rule 10(c) of the Rules of the Supreme Court identifies the following as a special and important reason why

this Court may choose to review a decision of a United States court of appeals on certiorari:

> When . . . a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

See also Schlude v. Commissioner, 372 U.S. 128, 130 (1968) (Certiorari granted where court of appeals has misapplied or misconstrued relevant Supreme Court precedent).

In this case, petitioners Mett and Wiseman seek a writ of certiorari to the Ninth Circuit Court of Appeals on the grounds that the Ninth Circuit's decision, like a recent decision of the Sixth Circuit Court of Appeals (*United States v. Krimsky*, 230 F.3d 855 [6th Cir. 2000]) contradicts and misapplies controlling precedent of this Court as to the meaning of the statutory element of "willfulness" in the context of a federal criminal prosecution.

Specifically, as set forth in *Bryan v. United States*, 524 U.S. 184 (1998) and *Ratzlaf v. United States*, 510 U.S. 135 (1994), where a statutory offense is predicated upon proof of "willful" misconduct or conduct done with a "bad purpose," the prosecution must, at a minimum, prove that the defendant knew that his conduct was unlawful.

In its opinion below, the Ninth Circuit expressly recognized that 18 U.S.C. § 664 prohibits the "willful" abstraction or conversion of pension funds subject to ERISA, but approved a trial court instruction which affirmatively states that the statute is violated *whether or not* the defendant realized that his conduct was unlawful.

The Sixth Circuit Court of Appeals' decision in *Krimsky*, *supra*, is to the same effect.

Beyond the fact that they present a direct conflict with this Court's precedent, the decisions of the Courts of Appeals raise an important question of law that should be settled by this Court. Among other things, the decisions relieve the government of its obligation to prove all elements of the offense beyond a reasonable doubt, implicating the most fundamental due process concerns, as set forth in *In re Winship*, 397 U.S. 358 (1970). Furthermore, given that § 664 governs *any* pension fund subject to ERISA's demanding requirements, the appellate courts' departure from this Court's precedent will surely spawn a flood of litigation as to the reach of the statute. This Court's writ of certiorari should therefore issue.

ARGUMENT

I. This Court Should Grant Certiorari Because The Ninth Circuit, Like the Sixth Circuit, Has Adopted A Rule Which Squarely Conflicts With Relevant Supreme Court Precedent As To The Meaning Of The Statutory Element of Willfulness In A Federal Criminal Prosecution

18 U.S.C. § 664 makes it a crime to embezzle, steal or *willfully* abstract or convert pension funds to one's own use or the use of another. In light of that statutory language, defendant sought their proposed instruction, which, again, required the government to prove knowledge of illegality but, significantly, did *not* require defendant's knowledge of the specific statutory provision prohibiting the alleged misconduct. The district court's refusal to read

the instruction effectively gutted the defense, particularly in light of the available evidence that defendants believed that their conduct had been authorized and, in any event, did not contravene any provision of federal criminal law.

In their briefing before the Ninth Circuit, defendants invoked both this Court's precedent (*Bryan v. United States*, 524 U.S. 184 [1998]; *Ratzlaf v. United States*, 510 U.S. 135 [1994]) and Ninth Circuit precedent (*see United States v. Lizarraga-Lizarraga*, 541 F.2d 826 [9th Cir. 1976]) in support of their claim that the instruction was warranted.

In *Bryan*, this Court considered an appellant's challenge to trial court instructions which addressed the meaning of the term "willful" as used in 18 U.S.C. § 924(a)(1)(D), a statute forbidding the willful dealing in firearms without a federal license. The Court held that while the statute does not require proof that the defendant was aware of the specific licensing requirement, it *does* require proof that the defendant knew that his conduct was unlawful. *Id.*, 524 U.S. at 191-192. Citing *Ratzlaf*, the Court observed:

> The word "willfully" is sometimes said to be "a word of many meanings" whose construction is often dependent on the context in which it appears. See, e.g., Spies v. United States, 317 U.S. 492, 497, 63 S.Ct. 364, 367, 87 L.Ed. 418 (1943). Most obviously it differentiates between deliberate and unwitting conduct, but in the criminal law it also typically refers to a culpable state of mind. As we explained in United States v. Murdock, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381 (1933), a variety of phrases have been used to describe that concept. *As a general matter, when used in the criminal context, a "willful" act is one*

> *undertaken with a "bad purpose." In other words, in order to establish a "willful" violation of a statute, "the Government must prove that the defendant acted with knowledge that his conduct was unlawful."* Ratzlaf v. United States, 510 U.S. 135, 137, 114 S.Ct. 655, 657, 126 L.Ed.2d 615 (1994).

Id. (Emphasis added and footnotes omitted).

Applying these principles, *Bryan* specifically held that in a case charging a violation of a statute containing a willfulness requirement, the trial court erred in instructing the jury, as did the lower court here, that *"the government [is not] required to prove that he had knowledge that he was breaking the law." Id.*, at 199 (emphasis added).

In approving the district court's rejection of the proposed defense instruction in the instant case, the Ninth Circuit acknowledged that under relevant Ninth Circuit precedent, a § 664 violation does require proof of "specific criminal intent," *see Wiseman*, 274 F.3d at 1240 [App. 6]), and that "'[t]he act to be criminal *must be willful*, which means an act done with a fraudulent intent or a *bad purpose* or an evil motive." *Id.*, citing *United States v. Andreen*, 628 F.2d 1236, 1241 (9th Cir. 1980) (Emphasis added).

Notwithstanding these requirements, however, the panel held that the statute does *not* require "that the defendant also know his conduct was illegal." *Id.*, citing *United States v. Ford*, 632 F.2d 1354, 1362 (9th Cir. 1980), *overruled on other grounds*, *United States v. DeBright*, 730 F.2d 1255, 1259 (9th Cir. 1984) (en banc). On this point, the Court invoked *Bryan* for the purported holding that knowledge of unlawfulness is only required when, *inter*

alia, "the criminal conduct is contained in a regulation instead of a statute." *Wiseman*, 274 F.3d at 1240-1241 (App. 7).

The Ninth Circuit's opinion flatly misconstrues *Bryan*, which never declared that the presence of a legal prohibition in a regulation, as opposed to a statute, was the necessary predicate for a knowledge-of-unlawfulness requirement. Indeed, in *Bryan*, this Court required knowledge of illegality where the violation arose from *statutory* provisions – i.e., those criminalizing dealing in firearms without a federal license, as prohibited by 18 U.S.C. §§ 922 and 924 – rather than regulatory provisions. Thus, under *Bryan* and *Ratzlaf*, the trigger for an instruction requiring proof of a defendant's knowledge of the illegality of his conduct is not a regulatory definition of criminal conduct, but simply the inclusion within a criminal statute of the term "willfully."

Furthermore, *Bryan* made it quite clear that where – as here – a statutory offense requires proof of *willful misconduct* and *conduct done with a bad purpose*, the offense requires, as a minimum, proof of knowledge that the conduct was illegal. Again, the Ninth Circuit's opinion expressly adheres to the requirements of willful misconduct and conduct done with a "bad purpose," but unaccountably dispenses with the concomitant knowledge-of-illegality requirement. The opinion simply cannot be reconciled with the Supreme Court's opinions in *Bryan* or *Ratzlaf*.

Equally irreconcilable with this Court's precedent is the Sixth Circuit's decision interpreting § 664 in *United States v. Krimsky*, 230 F.3d 855 (6th Cir. 2000). There the Court of Appeals rejected the defendant's challenge to

an instruction which did not require a finding that the defendant's conduct was "purposely unlawful," but instead permitted conviction where the defendant merely acted with "reckless disregard" for the interests of an ERISA-governed plan. Significantly, on this point, the Court failed to invoke any Supreme Court authority at all, relying instead on the law of the Sixth Circuit alone. *Krimsky*, 230 F.3d at 860-861.

The requirements imposed on pension fund administrators are unusually complex. *See Fuller v. Norton*, 86 F.3d 1016, 1020 (10th Cir. 1996); *Gerosa v. Savasta*, 189 F.Supp.2d 137, 148-149 (S.D.N.Y. 2002). The Ninth and Sixth Circuits nevertheless have interpreted the criminal statute relating to fund administration in a fashion that dramatically reduces the degree of culpability needed to trigger a finding of guilt. This construction flies in the face of this Court's established precedent as to the meaning of a specific term employed in the statute. The resulting conflict implicates the constitutional requirement that the government prove all elements of a criminal offense beyond a reasonable doubt and is certain to prompt a host of prosecutions that, under this Court's precedent, are not statutorily authorized. A writ of certiorari to the Ninth Circuit is therefore in order.

CONCLUSION

For the reasons stated, the Court should grant the instant petition and order briefing and argument in the case.

Respectfully submitted,

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274 F.3d 1235

United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Marvin L. WISEMAN, Defendant-Appellant.

United States of America, Plaintiff-Appellee,
v.
William D. Mett, Defendant-Appellant.

Nos. 00-10325, 00-10341

Argued and Submitted July 11, 2001
Filed Dec. 19, 2001

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Appeal from the United States District Court for the District of Hawaii; Edward Rafeedie, District Judge, Presiding. D.C. No. CR-96-00607-ER, D.C. No. CR-96-00607-1-ER.

Before: CYNTHIA HOLCOMB HALL, WARDLAW, and BERZON, Circuit Judges.

CYNTHIA HOLCOMB HALL, Circuit Judge:

Marvin L. Wiseman and William D. Mett ("Defendants") were convicted in 1997 of embezzling money from a pension benefit plan governed by the Employee Retirement

Income Security Act (ERISA). This court reversed their convictions on appeal and remanded for a new trial. *United States v. Mett,* 178 F.3d 1058 (9th Cir.1999). After the district court rejected Defendants' proposed jury instructions, Defendants waived a trial by jury and agreed to a bench trial on the transcripts and exhibits of the first trial. Defendants were again convicted on all counts. They now appeal their convictions and sentences. We affirm in part, reverse in part, and remand for resentencing.

FACTUAL BACKGROUND

The following facts are taken from this court's opinion in Defendants' appeal from their first trial:

> These criminal prosecutions stem from certain transactions involving ERISA[1] pension benefit plans administered by Center Art Galleries ("CAG") for its employees. Mett founded CAG, a retail art gallery, in 1973 and served as its president and sole shareholder. Wiseman served as a vice-president, responsible for staff training and art acquisition. Both defendants also served on the CAG board of directors. In 1977, CAG established two pension benefit plans for its employees. Both plans were funded solely by CAG contributions, and both were covered by ERISA. At all relevant times, Mett and Wiseman served as trustees for both plans, while CAG served as the plan administrator.

CAG fell on hard times in the early 1990s. In 1990, as a result of a federal investigation into CAG's sales practices,

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[1] Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq.

Mett, Wiseman, and CAG were indicted, tried and convicted of felony art fraud. The prosecution, coupled with a general downturn in the Hawaiian economy, proved devastating to CAG's financial health. Between March 1990 and November 1991, in order to meet CAG's financial obligations, Mett and Wiseman withdrew approximately $1.6 million from the pension plans and deposited the funds into CAG's general operating accounts. At no time during 1990 and 1991 did the defendants inform their employees of these transactions. CAG also did not disclose the withdrawal transactions on the 1990 Form 5500 that it filed with the IRS in connection with one of the benefit plans.[2]

On June 27, 1996, a federal grand jury returned a 16 count indictment against the defendants in connection with the pension plan withdrawals. At trial, the defense turned on whether the defendants possessed the requisite specific intent when they arranged the withdrawals. While admitting that they withdrew funds from the pension plans, the defendants characterized the withdrawals as "loans" necessary to carry CAG through rough financial times. According to the defendants, their actions were intended to benefit their employees, who would otherwise have been laid off and faced with unemployment. The defendants further argued that the employees implicitly authorized, or would have authorized the withdrawals had they known of them. On June 25, 1997, the jury convicted

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[2] Pursuant to applicable tax laws, CAG as plan administrator was required to file Form 5500 annually in connection with one of the CAG plans, the Defined Benefit Plan. In completing a Form 5500, a plan administrator generally must report any transactions with parties in interest.

the defendants on 15 counts,[3] finding them guilty of embezzling from a pension benefit plan, in violation of 18 U.S.C. § 664, conspiring to misappropriate the assets of a pension benefit plan, in violation of 18 U.S.C. § 371, unlawfully serving as a trustee of a pension benefit plan after being convicted of a felony, in violation of 29 U.S.C. § 1111, and filing a false annual report relating to a pension benefit plan, in violation of 18 U.S.C. § 1027.[4] *United States v. Mett,* 178 F.3d at 1060-61 (footnotes in original).

Finding that the admission of certain documents and testimony violated Defendants' attorney-client privilege, this court reversed their convictions and remanded for a new trial. *Id.* at 1067. The court also rejected Defendants' "authorization" and "participant benefit" defenses to the pension fund embezzlement charges. *Id.* at 1067-68.

Prior to the retrial, Defendants submitted two proposed jury instructions to the district court and requested a pretrial ruling on whether the court would give the instructions. Defendants explained that if the court refused the proffered instructions, Defendants would waive a jury trial and submit the case to the court on the transcripts and exhibits from the first trial. Defendants further explained that although they would waive a jury for the retrial, they would appeal the court's denial of their proposed instructions.

The district court rejected the proposed instructions, and Defendants waived a jury trial. The waiver stated:

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[3] One count was dismissed at the close of the government's case.

[4] The last count, involving the false filing of an annual report relating to an ERISA plan, named only Mett.

> All parties and the court agreed that, should the defendants be convicted at a court trial, they would retain the right to challenge those convictions on appeal by raising the claim that the court erred in denying them these proposed instructions. It is on the basis of that understanding that the defendants now waive their right to a jury trial.

The court retried Defendants based on the transcripts and exhibits of the first trial, minus the testimony and documents this court found protected by the attorney-client privilege. The court found the defendants guilty on all counts and sentenced each to sixty-three months imprisonment and three years supervised release. Defendants appeal their convictions and sentences, arguing that the proposed jury instructions should have been accepted, that there was insufficient evidence to sustain their convictions, that evidence was admitted in violation of the attorney-client privilege, and that the district court erred in failing to apply offset principles to calculate the amount of loss for the purpose of determining Defendants' sentences. We have jurisdiction pursuant to 28 U.S.C. § 1291.

DISCUSSION

I. Jury Instructions

We review de novo a denial of a defendant's jury instruction based on a question of law. *United States v. Eshkol,* 108 F.3d 1025, 1028 (9th Cir.1997).

A. Knowledge of Illegality

Before their retrial and before agreeing to a bench trial, Defendants proposed a jury instruction that would

have required the government to "prove beyond a reasonable doubt that the defendants took money from the funds knowing that it was illegal to do so" to convict Defendants of violating 18 U.S.C. § 664. The district court correctly rejected Defendants' proposed instruction.

A person violates § 664 if he "embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another" assets belonging to an employee pension benefit plan subject to ERISA. 18 U.S.C. § 664. In Defendants' prior appeal in this case, we explained that "the essence [of a § 664 offense] is theft and in the context of . . . pension funds the offense includes a taking or appropriation that is unauthorized, if accomplished with specific criminal intent." *Mett,* 178 F.3d at 1067 (alteration in original) (quoting *United States v. Andreen,* 628 F.2d 1236, 1243 (9th Cir.1980)). "The act to be criminal must be willful, which means an act done with a fraudulent intent or a bad purpose or an evil motive." *Andreen,* 628 F.2d at 1241. While the defendant must "knowingly act [ ] wrongfully to deprive another of property," there is no requirement that the defendant also know his conduct was illegal. *United States v. Ford,* 632 F.2d 1354, 1362 (9th Cir.1980), *overruled on other grounds by United States v. DeBright,* 730 F.2d 1255, 1259 (9th Cir.1984) (en banc).

Ratzlaf v. United States, 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994), and *United States v. Lizarraga-Lizarraga,* 541 F.2d 826, 828 (9th Cir.1976), do not require a different result. Unlike in those cases, there is no risk in this § 664 case that Defendants would be convicted for otherwise seemingly innocent conduct, because they must know that they are "acting wrongfully and contrary to the trust placed in them by the pension trust beneficiaries."

Ford, 632 F.2d at 1362; *see also United States v. Henderson,* 243 F.3d 1168, 1172 (9th Cir.2001) ("[P]roof of knowledge of unlawfulness is required when the criminal conduct is contained in a regulation instead of in a statute, and when the conduct punished is not obviously unlawful, creating a 'danger of ensnaring individuals engaged in apparently innocent conduct.'" (quoting *Bryan v. United States,* 524 U.S. 184, 191, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998))). Indeed, to require more would mean that to prove embezzlement in ERISA cases would require proof of a higher mens rea than in other embezzlement cases. This court has determined, however, that "embezzlement," as used in § 664, is to be given its "accepted definition [ ]," which does not include a requirement that the defendant know his conduct is illegal. *Andreen,* 628 F.2d at 1241; *see also United States v. Thordarson,* 646 F.2d 1323, 1335 n. 22 (9th Cir.1981) (listing elements of embezzlement offense). The district court correctly rejected Defendants' proposed instruction.

B. Intent to Borrow

Defendants also requested that the district court instruct the jury, "Since [the defendants] are accused of stealing the plan funds rather than borrowing them, the government must prove beyond a reasonable doubt that the funds at issue were not loaned to [Center Art Galleries ('CAG')]" The instruction further would have required the jurors to acquit if they had "a reasonable doubt as to whether the defendants intended to borrow the money rather than steal it." According to Defendants, because the government's theory of the case was that the transfers from the pension plan to CAG were the result of theft or embezzlement, the government needed to prove that the

transfers were not actually loans. Defendants argue that the district court's failure to abide by the law as stated in their proposed instruction resulted in a constructive amendment of the indictment in violation of *Stirone v. United States,* 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), and *United States v. Shipsey,* 190 F.3d 1081 (9th Cir.1999). We disagree.

Evidence that Defendants borrowed the plan funds may be relevant to their criminal intent. *Cf. Mett,* 178 F.3d at 1068. Intent to repay generally is not a defense to embezzlement, however. *See United States v. Ross,* 206 F.3d 896, 899 (9th Cir.2000). Nor is it a defense to conversion. *See Thordarson,* 646 F.2d at 1335 n. 22 (noting that conversion can be accomplished "without any intent to keep possession, so long as the property is misused or abused" (citing *Morissette v. United States,* 342 U.S. 246, 271-72, 72 S.Ct. 240, 96 L.Ed. 288 (1952))). The government thus did not need to disprove Defendants' intent to borrow the funds to convict them of embezzlement.

Further, the indictment charged Defendants with conspiracy "to embezzle, steal and unlawfully and willfully abstract and convert to their own use, and the use of another" pension benefit plan money, and with related substantive counts. The indictment also alleged that Defendants "withdrew" funds from the pension accounts, "transferred the bulk of the money to CAG to keep the company operational," drew substantial salaries and cash advances from CAG's accounts, and used money to pay their criminal attorneys. The indictment clearly does not limit the government's theory to *stealing.* Nor does it preclude the argument that the theft may have been accomplished by first transferring the money to CAG in the form of a loan. *Cf. Shipsey,* 190 F.3d at 1087 (reversing

a conviction where the indictment alleged that the defendant took pension fund money by means of false pretenses, but the jury instructions permitted the jury to convict if it found the defendant took the money by false pretenses *or* by a "wrongful act" or conversion, because the defendant had notice only of the theory of theft by false pretenses). Similarly, the government's argument at sentencing indicated only that the government proceeded on a theft theory, not that the government excluded the possibility that the theft was accomplished through transfers taking the form of loans. There was no constructive amendment of the indictment, and Defendants' proposed loan instruction was properly rejected.

II. Sufficiency of the Evidence

Claims of insufficient evidence are reviewed de novo. *United States v. Antonakeas,* 255 F.3d 714, 723 (9th Cir.2001).

A. Mett

Mett was convicted of violating 18 U.S.C. § 1027, which criminalizes the making of known false statements, and the knowing concealment of material facts, in a document required by ERISA. In the CAG benefit plans 1990 Form 5500 ERISA annual report, question 30(e) of the Form 5500 asked whether the notes to the appended plan financial statement disclosed any non-exempt transactions of parties in interest, which includes transactions between the plan and CAG. Information on such transactions is material because it may indicate a lack of sufficient funds in the plan to pay benefits. Mett's response to question 30(e) was "yes." Question 30(f) asked whether the

plan engaged in any such transactions that were not reported in question 30(e). Mett answered the question "no," thus indicating that the Form 5500 fully disclosed all transactions between the plan and CAG. However, the Form 5500 statement of plan assets failed to disclose the over $400,000 that had been transferred from the plan to CAG's operating account in 1990.

Mett argues that the evidence is insufficient to convict him of violating § 1027 because a "no" answer to question 30(e) would have been more misleading than his "yes" by indicating that no prohibited transactions had occurred when in fact they had. The evidence shows, however, that Mett failed to disclose over $400,000 in prohibited transactions on the Form 5500, even though his responses to the questions indicated that the information provided in the form was complete.

Mett also argues that his conviction must be reversed because there was no evidence that he knew the statement of plan assets failed to list the prohibited transactions. Mett clearly knew about the transactions between the plan and CAG. Although Mett testified that he turned over all relevant plan documents to the accountant who prepared the statement, the accountant testified that Mett did not tell him about the transfers from the plan to CAG. Mett signed and filed the Form 5500. The evidence is sufficient to support Mett's conviction. *See United States v. Martorano,* 767 F.2d 63, 66 (3d Cir.1985) (finding a violation of § 1027 where the defendant filed a Form 5500 that failed to disclose a prohibited transaction, and the defendant failed to disclose to his attorney the relevant information needed to accurately complete the form); *United States v. Tolkow,* 532 F.2d 853, 857 (2d Cir.1976) (finding a § 1027 violation where the defendant signed and filed a

false Form 5500, and the defendant failed to disclose party-in-interest loans to the accountant preparing the attached financial reports).

B. Wiseman

Wiseman argues that there is insufficient evidence to support a finding that he was aware of, or participated in, any improper financial transactions involving plan funds, and therefore his convictions on counts one through twelve for violating 18 U.S.C. § 664 should be reversed. The evidence is sufficient to support his convictions.

Key evidence of Wiseman's involvement in the embezzlement is his endorsement, along with Mett's as joint signatories, of the checks drawn from the benefit plan accounts and deposited in CAG's account. Wiseman argues that there is no evidence in the record to authenticate the endorsement on the checks as his signature and that the district court committed reversible error when it determined that Wiseman's failure to object to the checks at his first trial and his stipulation to a second trial on the transcripts and exhibits of the first trial "permits the court to infer that they are authentic and genuine."

Despite Wiseman's stipulation, the burden remained on the government to prove its case beyond a reasonable doubt, and Wiseman made no express waiver of any objection that he could have raised during the first trial. The district court did not rely solely on Wiseman's stipulation to find the signatures authentic, however. The court also found that "the government has proven, through abundant other circumstantial evidence, that [the checks] were, in fact, signed by Mr. Wiseman." The record contains known exemplars of Wiseman's signature, from which the

court could make a lay comparison of the signatures and conclude they were Wiseman's. *See United States v. Woodson,* 526 F.2d 550, 551 (9th Cir.1975) (permitting a lay comparison of signatures).

Moreover, the evidence shows that Wiseman participated in concealing the withdrawal of plan funds from CAG employees. When CAG employees grew concerned for the security of their pension funds, Wiseman enlisted actuary Kathy Choy to give the employees reassurances that their money was secure. Wiseman attended meetings wherein Choy attempted to reassure CAG employees that their pension funds were secure. Although Wiseman was present at the meetings and knew of the withdrawals from the plan accounts, he never told the employees that money had been withdrawn from the plan accounts or that CAG was using plan funds for operating expenses.

Wiseman's participation in the concealment of the withdrawal of plan funds also supports the court's finding that Wiseman possessed the requisite criminal intent. *See United States v. Harris,* 185 F.3d 999, 1006 (9th Cir.1999) (inferring intent from acts of concealment). Moreover, Wiseman's criminal intent can be inferred from the substantial benefit he received from the embezzlement of plan funds. *See Andreen,* 628 F.2d at 1245 (noting that criminal intent "may be inferred from . . . evidence that transfers yielded personal profit to the trustee"). Wiseman received $515,000 in salary from CAG while the unlawful withdrawals were being made. Wiseman also avoided payment of a $700,000 fine resulting from his 1990 art fraud conviction by arguing to the court in that case that the money was to be placed into the employee pension plan because it was underfunded. Wiseman and Mett then proceeded to remove the entire $700,000 from the plan account.

Wiseman further argues that because the government witnesses and counsel referred to "Mett and Wiseman" without distinguishing the conduct of one from the other, the evidence is too vague as to Wiseman's own conduct to support his conviction. Wiseman did not object to the government's questions referring to "Mett and Wiseman." Further, there is sufficient evidence regarding Wiseman's independent conduct to support his conviction. He participated in concealing the plan withdrawals from employees, received his own $515,000 salary, and signed the withdrawal checks. Although Wiseman offers a lengthy review of evidence that tends to minimize his role in CAG, his role as a trustee, and his involvement in the transfer of funds from the plans to CAG, Wiseman does not dispute that he was a plan trustee, that he signed the plan documents, and that the plan documents prohibited transfers of plan assets to CAG. The evidence is not impermissibly vague, and it is sufficient to support Wiseman's conviction on counts one through twelve.

III. Attorney-Client Privilege

We review the district court's attorney-client privilege determination de novo. *United States v. Bauer,* 132 F.3d 504, 507 (9th Cir.1997).

In counts thirteen and fourteen,[5] Defendants were charged with violating 18 U.S.C. § 1111 by serving as trustees of an employee benefit plan while knowing their 1990 art fraud convictions disqualified them from doing so. In the first trial, Defendants' attorney, Thomas Foley,

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[5] Count thirteen applied to Mett; count fourteen applied to Wiseman.

testified that he advised Mett and Wiseman that they could no longer serve as ERISA trustees. *See Mett,* 178 F.3d at 1062. Mett then testified at the trial and confirmed that Foley informed him and Wiseman that they could no longer serve as trustees.

On appeal, this court held that Foley's testimony was admitted in violation of Defendants' attorney-client privilege. *Mett,* 178 F.3d at 1065. Before retrial, Defendants moved to exclude all of Foley's testimony plus Mett's testimony that Foley told him and Wiseman they could no longer serve as trustees. The district court granted the motion as to Foley's testimony only, and then relied on Mett's testimony to find Defendants guilty. Defendants contend that Mett's testimony should have been excluded as testimony derived from a violation of their attorney-client privilege.

By failing to exclude Mett's testimony, the district court failed to give full effect to this court's ruling in the prior appeal. Mett's testimony that Foley informed him and Wiseman they were disqualified from serving as plan trustees clearly was offered in response to Foley's testimony as part of an attempt to explain it away and provide a good faith justification for their continued service as trustees. Mett explained that he and Wiseman *tried* to withdraw as trustees when Foley informed them they were disqualified, but Foley told them they could not withdraw until a successor trustee was found. Further, had the government asked Mett at trial whether Foley told him and Wiseman they were disqualified from serving as trustees, under this court's ruling in the prior appeal, the district court would have been required to sustain an objection on privilege grounds. It thus does not require "substantial speculation" to conclude that the government

would not have been able to elicit the testimony, and the district court abused its discretion by denying the motion to exclude Mett's testimony.

Moreover, the error was not harmless. The district court expressly relied on Mett's testimony to convict both Defendants of violating 18 U.S.C. § 1111. The government does not argue that there was other evidence in the record from which the district court could have found Defendants guilty. We therefore reverse Defendants' convictions on counts thirteen and fourteen.

IV. Sentencing

Defendants argue that their sentences must be reversed because the district court failed to apply the offset principles set forth in the commentary to U.S.S.G. § 2F1.1 to calculate the amount of loss for the purpose of determining Defendants' sentences. Defendants' argument hinges on their factual contention that the prohibited transactions involved loans. The district court's factual findings in the sentencing phase are reviewed for clear error. *United States v. Caperna,* 251 F.3d 827, 830 (9th Cir.2001).

The district court specifically found, however, that "the argument that these funds were loaned is simply belied by the evidence." Defendants point to evidence in support of their claim that the withdrawals were loans, but that evidence does not mandate the conclusion that the district court's findings were clearly erroneous. Indeed, the only promissory notes relating to the alleged loans were prepared well after the withdrawals occurred, after the Department of Labor initiated an investigation into CAG's plans, and after Defendants were replaced as plan

trustees. Because the district court's finding that the transfers were not loans is not clearly erroneous, the court did not err by failing to apply the offset principles in § 2F1.1 to calculate the amount of loss.

CONCLUSION

For the foregoing reasons, we reverse both Defendants' convictions on counts thirteen (Mett) and fourteen (Wiseman), violation of 18 U.S.C. § 1111. We affirm their convictions on the remaining counts and affirm the district court's calculation of the amount of loss for sentencing purposes. The case is remanded for resentencing.

AFFIRMED in part, REVERSED in part, and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, vs. (01) WILLIAM D. METT, (02) MARVIN L. WISEMAN, Defendants.	)))))))	CRIMINAL NO. 96-00607ER

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing on Tuesday, March 14, 2000, at 10:10 a.m., at Honolulu, Hawaii,

BEFORE:

THE HONORABLE EDWARD RAFEEDIE

United States District Judge

REPORTED BY:
STEPHEN B. PLATT, RMR, CRR
Official U.S. District Court Reporter

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TUESDAY, MARCH 14, 2000 10:10 A.M.

[2] THE CLERK: Criminal Number 96-00607 ER, United States of America, versus defendant one, William D. Mett, defendant two, Marvin L. Wiseman. This hearing has been called for court's ruling.

Counsel, your appearances for the record, please.

MR. TONG: Good morning, Your Honor.

Larry Tong for the United States. With me is Senior Investigator Julie Lowrie of the U.S. Department of Labor.

MR. RIORDAN: Good morning, Your Honor.

Dennis Riordan and Donald Horgan for defendant Mett, who is present in court this morning.

MR. WACHTEL: And, good morning, Your Honor. Arthur Wachtel and Maitreya Badami, who are here for defendant Wiseman.

THE COURT: Yes, the matter was put over to this morning so the court could announce its decision on

the court trial on Counts 1 through 15 of the first superseding indictment. Number 96-00607.

The court, as I indicated yesterday, had carefully reviewed the transcripts and the exhibits which have been offered into evidence, omitting the testimony of Attorney Thomas Foley, and all the pleadings, and oral argument; that [3] is, I have considered also the pleadings and the oral argument made by counsel. And I have now reached the following conclusions regarding this case:

First, with respect to Count One of the first superseding indictment, this is the conspiracy count, the indictment charges both defendants with participating in a conspiracy to embezzle or convert or steal approximately $1,629,406.00 from both the defined benefit pension plan and the profit sharing plan of the Center Art Galleries, in violation of Title 18, United States Code, Section 664.

To prove that the defendants are guilty of conspiracy, of course, the government must prove beyond a reasonable doubt that the defendants agreed with each other, or with others, to embezzle or convert or steal money from the Center Art Galleries pension plan; that the defendants joined in this conspiracy willingly, and with knowledge of its objectives, and intending to help carry out its objectives, and that at least one of the defendants performed at least one of the overt acts alleged in the indictment for the purpose of carrying out the conspiracy.

Having reviewed the evidence in this case, the court finds that the record is replete with credible evidence showing that the defendants acted in concert to unlawfully embezzle or convert money from the pension fund at issue. The defendants were the sole trustees of the plan, and

their [4] joint agreement was necessary to remove assets from the plan.

This is not a case involving an isolated illegal transaction; rather, the evidence demonstrates that the defendants consistently used the pension plan as their own "piggy bank," so to speak; they acted as if the plans were their own personal accounts, taking plan assets and using them for a variety of purposes whenever they needed extra cash. This pattern is documented in numerous transactions where the defendants transferred assets from the plan to the Center Art Gallery accounts and then to causes chosen by the defendants.

These many illegal transactions are strong evidence, though by no means the only evidence, that the defendants both conspired and intended to unlawfully take assets from the pension plan. The defendants also committed multiple overt acts by improperly removing assets from the plan at issue on many occasions.

Accordingly, the court finds that the government has proven its case on Count One, beyond a reasonable doubt, and finds that the defendants are guilty of conspiracy to embezzle or convert funds under 18 U.S.C., 664.

Counts 2 through 12 of the indictment are the substantive counts arising out of the conspiracy. These charge the defendants with embezzling, unlawfully converting or stealing funds from the defined benefit pension plan and [5] the profit sharing plan of Center Art Galleries, which funds are subject to Title One of ERISA. Each of these counts deal with specific transactions where assets were removed from the plans at issue.

Under 18 U.S.C. 664, the government can – may prove its case by demonstrating, among other things, that the defendants either embezzled assets from the pension fund, or that they unlawfully and willfully converted plan assets.

Embezzlement in this context means the fraudulent appropriation of the property of another by one in lawful possession thereof. That comes from United States versus Ann Green, 628 F.2d 1236, 1241, a 1980 case. And "unlawful conversion" means the use of property placed in one's custody for a limited purpose in an unauthorized manner or to an unauthorized extent. Lack of authorization may be proved if the diversion of assets is substantially inconsistent with the fiduciary purposes and objectives of the pension plan, as set forth by statute, bylaws, charters or trust documents, or, in this case, the plan documents which govern use of the funds in question.

Money rightfully taken into one's custody may be converted without any intent to keep or embezzle it, merely by commingling it with the custodian's own funds, if he was under a duty to keep it separate and intact. So said the [6] Supreme Court of the United States in the case of Morissette versus United States, 342 U.S., 246, at 272. To prove the defendants guilty of conversion, the government must also show that the defendants acted willfully, which is defined as, quote, "an act done with a fraudulent intent or a bad purpose or an evil motive," end quote. This comes from the Andreen case. And willfulness may also encompass a reckless disregard for the interests of the protected fund, or the designated beneficiaries of the fund.

Now, the only factual dispute regarding the issue of whether the defendants took assets from the pension plan is defendant Wiseman's newly raised argument that none of the documents bearing his signatures have been sufficiently authenticated. The appropriate time to make this argument was at the defendant's original trial, where the defendant and his lawyer sat in silence while these documents were offered as his signature. No objection to the government offering these exhibits bearing his signature was made at that time, nor was there any argument raised concerning their authenticity. Additionally, the defendant Wiseman stipulated that the transcript and exhibits of the first trial would be the evidence to be considered by the court for the purposes of this retrial. Accordingly, the court believes that Wiseman's conduct concerning these exhibits permits the court to infer that they are authentic and genuine. And, in [7] addition, the court finds that the government has proven, through abundant other circumstantial evidence, that these documents were, in fact, signed by Mr. Wiseman.

The remaining evidence concerning the defendants' taking of pension assets is undisputed, except in regards to their intent at the time of the taking of the money. The court has carefully reviewed all the evidence and exhibits and finds that the record contains substantial credible evidence to support the finding that the defendants acted with fraudulent intent. Over a period of several years they took money and assets from the pension plan knowing that these funds belonged to the plans and to the plan beneficiaries, and that it was prohibited to remove the funds for non-approved purposes.

There is substantial evidence that they took pains to prevent their employees from learning of the massive scale

of which they had taken funds from the plan. They repeatedly took plan assets and used them for their own purposes, such as to pay the Center Art Galleries' operating expenses, including their own substantial salaries. On one occasion, when the pension plan was buttressed by an infusion of $700,000 to avoid being forced – which they sought to avoid being forced to use the funds to satisfy creditors or criminal penalties that might be imposed, they then proceeded to remove the entire $700,000, after arguing to Judge Fong that this money was to be placed into the employee pension plan account because it was underfunded. And then they used the $700,000 for their own purposes, including paying their attorneys who represented them in the criminal case.

They ultimately drained over $1.5 million from the plan accounts without any realistic hope of repaying the money. At that point in time, there was no hope that these people had the capacity to repay this money, even if they intended to. Or – the argument that these funds were loaned is simply belied by the evidence: Their business was virtually broke; they were heavily in debt to their lawyers; the money was gone from the pension plan; they had no realistic capacity to repay this money. And it has been fairly clear to the court that their own interest was given priority over the interest of the plan beneficiaries.

As the Ninth Circuit stated in remanding this case, Congress, quote, "meant to impose liability on employers who willfully arrogate to themselves the authority to sacrifice an employee's pension plan – or pension in favor of short-term benefits of their own devising." That's from United States versus Mett, 178 F. 3rd, 1058-1068.

Even taking as true the defendants' argument that they ultimately meant to repay the money that they took from the pension plan, the court has no doubt that the defendants' conduct meets and indeed exceeds the standard for imposing criminal liability announced by the Ninth Circuit on remand. Therefore, based on the reasons cited, and the record before the court, the court finds that the government has proved beyond a reasonable doubt that the defendants, and each of them, are guilty of both unlawful and willful conversion, and embezzlement, under 18 U.S.C., 664.

Counts 13 and 14 charge the defendant, Mr. Mett, William Mett in Count 13 and Marvin Wiseman in Count 14, respectively, with intentionally and unlawfully serving as trustees of ERISA plans in violation of 29 USC, 1111. In order to prove the defendants guilty on these counts, the government must prove beyond a reasonable doubt that the defendants sustained convictions – felony convictions, and, in this case, violations of 18 U.S.C. 1341, mail fraud; and that, two, within 13 years of such convictions the defendants served as trustees or representatives of an employee benefit plan, knowing that they were illegally disqualified – legally disqualified from doing so.

Defendant's convictions for mail fraud are well documented and not disputed.

As to the second element, defendant Mett testified at trial that both he and defendant Wiseman were advised by attorney Thomas Foley in late 1993 that they were disqualified from serving as pension plan trustees because of their mail fraud conviction. And the evidence showed that the defendants did not resign their positions as plan trustees until July of 1994.

The defendants have raised the argument that defendant Mett would not have testified concerning his awareness of the illegality of continued service as trustee had attorney Foley not been permitted to testify at trial. This argument, however, assumes that either Mett would not have testified at trial but for Foley's testimony, or that the government would not have been able to elicit this testimony from Mett had he testified. The defendant's assumption calls for substantial speculation by the court, and having been raised on the day of trial, has not been well documented or briefed by counsel. Also, the defendants stipulated to have the court hear this retrial based on the record from the first trial, and their argument on this issue implies that they should be permitted to rely on those parts of Mett's prior testimony which are favorable to their case, but exclude damaging testimony as being derived from privileged communications.

Now, having considered the defendants' argument and record before it, the court cannot find that Mett's testimony on this issue would have been substantially different had Foley not testified at trial, and, thus the court will not disturb that testimony.

Accordingly, the court finds that the defendants knew that they were prohibited from serving as trustees of the pension funds at issue in this case, and they continued to serve for several months after learning that it was unlawful for them to do so. So the court finds that defendant Mett is guilty of violating 29 USC, 1111, as charged in Count 13; and defendant Wiseman is guilty of Count 14 for the same violations.

Now, Count 15 charges defendant William Mett solely with making false statements and representations of facts

on a Form 5500 Annual Return/Report of Employee Benefit Plan, a document required to be filed under ERISA, in violation of Title 18 United States Code, Section 1027. To prove the defendant guilty of a violation of this section, the government must prove beyond a reasonable doubt that the Center Art Galleries' defined pension benefit plan is subject to Title One of ERISA; two, annual reports of the pension plan, known as the Form 5500, were required by ERISA to be published or kept as a part of the records of the plan; and, three, the defendant made or caused to be made a false statement or representation of fact which he knew to be false, or knowingly concealed, covered up or failed to disclose a fact, the disclosure of which was necessary to verify, explain, clarify or check for accuracy the completeness of the Form 5500.

As to elements One and Two, there is no dispute that the Center Art Galleries' defined benefit plan was subject to ERISA, and that the plan was required to file Form 5500.

The third element, defendant Mett, as trustee of the plan, filed a Form 5500 for calendar year 1990, which suggested that it fully disclosed all transactions between the plan and the Center Art Galleries. Credible evidence shows, however, that the funds in excess of $400,000 had been transferred from the plan to the Center Art Galleries during that year and were not disclosed on the accountant's statement attached to the Form 5500 and submitted by Mr. Mett. The accountant who prepared the statement, Patrick Vyas, testified that Mett did not tell him about the transfers from the plan to the Center Art Galleries. Mett, nonetheless, signed and filed a Form 5500, knowing that it was false because it did not accurately disclose substantial

transfers of assets from the plan to the Center Art Galleries.

Accordingly, the court finds that the government has met its burden of proof on Count 15 and finds that the defendant Mett is guilty of filing a false Form 5500 in violation of 18 U.S.C., 1027.

Finally, pursuant to the government's request and the defendants' stipulation at the hearing of March 13th, 2000, to the effect that they were on bail during the time covered by the first superseding indictment, the court finds that the defendants did commit the instant crime while on bail from their mail fraud conviction in violation of 18 U.S.C., 3147-1.

Now, that concludes the court's reasons for the finding of guilt of each defendant on all counts as charged in the indictment.

* * *

I, Stephen B. Platt, Official Court Reporter, United States District Court, District of Hawaii, do hereby certify that the foregoing is a true and correct transcript of proceedings before the Honorable Edward Rafeedie, United States District Judge.

/s/ Stephen B. Platt

TUESDAY,
MARCH 21, 2000

STEPHEN B. PLATT,
CSR NO. 248

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARVIN L. WISEMAN, Defendant-Appellant.	No. 00-10325 D.C. No. CR-96-00607-ER
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILLIAM D. METT, Defendant-Appellant.	No. 00-10341 D.C. CR-96-00607-1-ER ORDER (Filed Feb. 28, 2002)

Before HALL, WARDLAW, and BERZON, Circuit Judges.

The panel has voted to deny appellants' petitions for rehearing. Judges Wardlaw and Berzon have voted to reject the petitions for rehearing en banc and Judge Hall has recommended rejection. The full court has been advised of the petitions for rehearing en banc and no active judge has requested a vote on whether to rehear the matters en banc. Fed. R. App. P. 35.

The petitions for rehearing en banc are DENIED.